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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, ET AL.,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, ET AL.,

Respondents.

DEAD SEA BROMINE CO., LTD., ET AL.,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

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BRIEF OF RESPONDENTS

This case presents two questions concerning the scope of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11:

1. Whether a corporation qualifies as an "agency or instrumentality," for purposes of FSIA Section 1603(b)(2), if a foreign state does not own any shares of the corporation in question but instead owns a majority of the shares of a parent company that in turn owns a majority of the shares of the corporation.

2. Whether a corporation qualifies as an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but not at the time that a plaintiff commenced suit against the corporation.

In this case, the Ninth Circuit, per Kozinski, J., properly held that the FSIA's ownership test applies only to the first tier of direct corporate ownership by a foreign state. The Ninth Circuit did not decide the second question presented, although it opined that there is "a plausible basis for concluding that the FSIA does not come into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer." Pet. App. 21a.[1] The Ninth Circuit was correct. The proper construction of the FSIA indicates that a corporation is not covered by the FSIA if the foreign state does not own a majority of shares at the time the plaintiff commences suit.

STATEMENT

1. The Dead Sea Companies

This case presents a particularly attenuated claim to the protections of the FSIA. Petitioners Dead Sea Bromine Co., Ltd.

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[1] Unless otherwise indicated, citations are to the appendix in No. 01-594, *Dead Sea Bromine Co. v. Patrickson.*

("Dead Sea Bromine") and Bromine Compounds Limited ("BCL") (together, the "Dead Sea Companies") were never owned directly by the Israeli government. Pet. App. 22a. Rather, "at all relevant times, the chain of ownership included intermediary corporations." *Id.* at 65a. Between 1968 and 1995, the Companies were second-tier, third-tier, or fourth-tier members of a corporate chain whose top parent company was government-owned. *Id.* For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea Bromine. *Id.* Dead Sea Bromine owned 50% of BCL, and Dead Sea Works owned 25% of BCL. *Id.* After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals, Ltd., an Israeli corporation owned by the State of Israel.

The Ninth Circuit found that "[a]ny ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times." *Id.* Indeed, petitioners no longer focus on the State of Israel's alleged "ownership" interest in BCL as a means of satisfying Section 1603(b)(2) of the FSIA. Dead Sea Br. 7 n.4.

Moreover, any interest by the State of Israel has diminished over time. In the early 1990s, the Dead Sea Companies were privatized. Pet. App. 62a. Petitioners concede that – even under their calculations of indirect ownership – since 1995 the State of Israel "no longer holds a majority ownership interest in [Dead Sea Bromine]." Dead Sea Br. 7.

The Dead Sea Companies are commercial mining enterprises whose operations are far removed from the core concerns of the FSIA. An expert on Israeli law testified in the district court that Dead Sea Bromine "is not in any way an arm or an organ of the State, nor is it a government department or authority. Bromine is a commercial company for all intents and purposes." JA 223. "The Company is a separate legal entity which can sue or be

sued by the State." JA 227. "The Company is obliged to act in accordance with ordinary commercial considerations." *Id.*

The expert concluded that Dead Sea Bromine is an ordinary corporation which is in fact required by Israeli law to act "on an ordinary business basis." JA 224. "A government company is not an organ of the State, it is a separate and distinguished legal entity. Pursuant to Israeli law, it is managed in accordance with commercial considerations, it does not enjoy the immunities which the State enjoys and it is not subject to the duties and restrictions that apply to the Government." *Id.* "[I]t is a business company, just as every ordinary commercial company, private or public." JA 225. "[T]he Government is not entitled to dictate to Bromine other considerations for acting, and the Company is obliged to act in accordance with business considerations, just as any other commercial company." JA 225. If the directors act in the interests of the government rather than those of the company, they breach their duties of trust and may be sued. JA 226. A director "may not accept instructions from the Government as to the manner in which he votes." *Id.* "The Company is not an instrument or tool to be used by the State to attain any object whatsoever, it is not an agency or an instrument of the State and is not subordinate thereto." JA 227.

According to the testimony of Mr. Noah Ehrlich, a Dead Sea Bromine and BCL vice-president:

- Dead Sea was considered by the Israeli Government Companies Authority to be a commercial "profit-oriented company." JA 263.

- The Dead Sea Companies are motivated by a desire to increase their worldwide market share in developing new products to give them "a marketing and economic advantage." JA 233.

- Dead Sea employees are not employees of the state of Israel and are not paid by the state. JA 268.

• The Dead Sea Companies were obligated by law to act in accordance with "the business considerations by which a non-Government company is normally guided." JA 258.

• The Dead Sea Companies do not claim immunity in domestic lawsuits in Israel. JA 261.

• The Dead Sea Companies, not the government, are responsible for satisfying any judgment from their own assets. JA 261.

• The Dead Sea Companies have the ability to sue the government of Israel. JA 267-68.

• The government does not determine the day-to-day responsibilities or conduct of any Dead Sea employees. JA 268-69.

• The Companies engaged in day-to-day business activities, devised specific customer service programs, determined their product lines and product mix, purchased real estate, and increased production capacity, all without governmental approval. JA 234-35, 240, 252, 267.

• The government had no input in determining the price of the Companies' products. JA 252.

• The Dead Sea Companies applied for government R&D grants, which the government sometimes rejected. JA 239. Such grants were also given to non-government companies. JA 251.

• The Dead Sea Companies made their own decisions as to business insurance and routinely purchased it on the private market. JA 245.

• Dead Sea Bromine's human resource department set base salaries, JA 248, and its corporate parent provided "a specific wage discussion" as to wage increases and bonuses, after the Government Companies Authority decided "a wage

negotiation by . . . sector." JA 247.

• The government of Israel permitted the Dead Sea Companies to keep profits outside the country "for a long period of time" for the purpose of reinvesting in the business. JA 245.

• Dead Sea Bromine's vice president presented the company's annual budget to its corporate parent, Israel Chemicals Ltd., for approval. JA 249.

• The government never disapproved the companies' selection of legal advisers. JA 262-63.

Mr. Ehrlich also revealed that the Dead Sea Companies make their litigation decisions, including waiving of "sovereign" immunity, without consulting with, or even informing, the government. JA 255-57. The companies have hired lawyers, removed cases from state court, settled cases with plaintiffs, entered into contribution and indemnity agreements with third parties, and even waived sovereign immunity claims completely – all without advising, let alone securing the approval of, the Israeli government. *Id.*

2. The Instant Litigation

On October 3, 1997, plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the State of Hawaii. Pet. App. 57a. Plaintiffs are nine foreign residents injured while working on banana plantations in Latin America by a dangerous chemical that has been banned in the U.S. but that the Dole Defendants[2] have continued to export and use abroad. *Id.* at 4a. Plaintiffs were regularly exposed, without their knowledge and without proper protective equipment, to dibromochloropropane (DBCP), a pesticide that causes male

[2] The "Dole Defendants" includes the petitioners in No. 01-593. It does not include the petitioners in No. 01-594.

sterility, testicular atrophy, testicular and other cancers, miscarriages in women, mutation of sperm cells in men, damage to the liver and kidneys, and injury to retinal and corneal tissue. The National Cancer Institute (NCI) has described it as "one of the most potent known carcinogens." As early as 1958, an in-house toxicology report at Dow Chemical Co. concluded that DBCP was "readily absorbed through the skin and high in toxicity in inhalation." Dow's data also showed that "liver, lung and kidney effects might be expected" and that "testicular atrophy may result from prolonged, repeated exposure."

The Dole Defendants claim to have had business relationships with the Dead Sea Companies and have asserted a third-party claim against them. JA 11. Yet the Dead Sea Companies have never provided any evidence of when or where their DBCP was used (if ever), nor have they shown that any plaintiff was exposed to their DBCP. In fact, the Dead Sea Companies have denied causing harm to any of the plaintiffs. JA 56-65.

On October 31, 1997, the Dead Sea Companies filed their Petition for Removal. This Petition was allegedly premised on a third-party complaint filed two hours earlier on the same day by the Dole Defendants against the Dead Sea Companies. Pet. App. 58a. The removal petition was filed despite clear and unambiguous disclaimers in plaintiffs' complaint specifically denying claims for exposure to DBCP made by the Dead Sea Companies. JA 24, 39-40.

3. The District Court's Decision

The district court denied the Dead Sea Companies' assertion of FSIA jurisdiction. In a memorandum opinion and order dated September 9, 1998, the court held that the Dead Sea Companies were not agencies or instrumentalities of Israel.

The court began by accepting petitioners' view that the proper time for ascertaining FSIA foreign state status is the time the

alleged wrongdoing occurred. Pet. App. 62a-64a. But the court concluded that "Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C. § 1603(b)(2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state." *Id.* at 71a (following *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995), and *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996)).

The district court also held that the Dead Sea Companies could not qualify as "organs" of a foreign state for purposes of Section 1603(b)(2). The court found that "Dead Sea and BCL are commercial mining operations concerned with production, marketing, and profit." Pet. App. 78a. They are "not treated as agencies under Israeli law." *Id.* "[T]he government's control is not derived from the need to play an active supervisory role over a government created entity." *Id.* The Dead Sea Companies "were not created by the government to fulfill a government mission." *Id.* at 79a. Moreover, the district court noted that "the entities are not staffed solely with government employees." *Id.* at 78a.

Accordingly, the district court held that the Dead Sea Companies could not qualify as "agencies or instrumentalities" or "organs" under the FSIA and that removal under the FSIA was improper. Because it reached this conclusion, the district court had no occasion to reach plaintiffs' alternative argument that the Dead Sea Companies had been fraudulently joined. Pet. App. 79a n.5.

4. The Court of Appeals' Decision

The Court of Appeals affirmed the district court's holding with respect to the Dead Sea Companies, in a unanimous opinion authored by Judge Kozinski. The Ninth Circuit held that "the Dead Sea Companies were never owned directly by the Israeli

government" and therefore could not "claim to be instrumentalities through stock ownership." Pet. App. 22a. "[A] corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the FSIA." *Id.*

The Ninth Circuit also held that the Dead Sea Companies were not "organs" of the Israeli government under Section 1603(b)(3). The court found that "the Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel." *Id.* at 25a-26a. "The Companies could sue and be sued, and could in fact sue the government of Israel (although official Israeli documents describe such disputes as between 'a government company and another government body')." *Id.* at 26a. "These factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.*

SUMMARY OF ARGUMENT

In no other country in the world would the Dead Sea Companies be accorded the sovereign immunity they seek in this Court. Not even the courts of Israel, their home country, would treat them as immune from suit. Yet the Companies contend that Congress has bestowed such immunity on them, despite the fact that one of Congress' central purposes in enacting the Foreign Sovereign Immunities Act was to align U.S. law with international practice.

I. The statutory text and structure demonstrate that a corporation is not covered by the FSIA if a foreign state owns a majority of the shares of the parent company rather than a majority of the shares of the corporation itself. Section 1603(b)(2) should be interpreted against the fundamental corporate law principle that "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet v. Clark*, 287 U.S. 410, 415 (1932). When ownership of a subsidiary

corporation is tiered through an intermediate corporation, legal ownership of the subsidiary resides in the intermediate corporation that possesses the subsidiary's shares of stock. Many federal statutes refer to "control," "indirect" or beneficial forms of ownership, or other broad means of corporate affiliation. The FSIA does not. Because Congress used the phrase "owned by," rather than other statutory language, it is clear that Congress intended to require direct ownership by a foreign state.

Petitioners' alternate argument that the State of Israel held an ill-defined "other ownership interest" in the Dead Sea Companies is flawed. Section 1603(b)(2) does not refer in the abstract to "majority ownership interests." Rather, it refers to "shares or other ownership interest." The Ninth Circuit properly concluded that the reference to "other ownership interest" should not be interpreted "in such a way as to make the majority-shareholder requirement superfluous" but instead should be construed "simply to describe some other form of ownership not called shares of stock." Pet. App. 23a.

Petitioners' approach would frustrate the purposes of the FSIA. It would move the FSIA further away from its avowed purpose of making United States law consistent with international practice. It would also deprive U.S. citizens of means of legal redress against foreign entities by dramatically expanding the number of corporations which could qualify for the benefits of the FSIA. Petitioners' approach would create traps for even the most wary plaintiffs, since even many sophisticated litigants will be unaware that a foreign corporation's chain of ownership includes a foreign state or political subdivision at the top. The FSIA imposes many procedural burdens on U.S. plaintiffs, including loss of jury trial rights, strict tests for personal jurisdiction, special service rules, and limitations on execution of judgments. Extending these procedural rules to a host of tiered corporate entities, as petitioners seek, would run directly contrary to a central purpose of the FSIA.

There is no reason to stretch the statute to protect the interests of foreign states. If a foreign entity (whether corporate or not) is genuinely involved in sovereign activities, it can seek to satisfy a separate test for FSIA immunity, known as the "organ" test. Here, the lower courts held that the Dead Sea Companies did not meet that test, and petitioners do not seek review of the question.

II. A corporation is not covered by the FSIA if the foreign state does not own a majority of shares at the time the plaintiff commences suit. Congress used the present tense in drafting the statute. It included special rules for service of process and enforcement of judgments which plainly contemplate that the entity in question would actually qualify as a foreign state or an agency or instrumentality at the time of suit. The purposes of the statute point to the same interpretation.

The court of appeals' judgment should be affirmed.

ARGUMENT

I. A CORPORATION IS NOT COVERED BY THE FSIA IF A FOREIGN STATE OWNS A MAJORITY OF THE SHARES OF THE CORPORATE ENTERPRISE THAT IN TURN OWNS A MAJORITY OF THE SHARES OF THE CORPORATION.

A. The Text and Structure of the FSIA

The text and structure of the FSIA are dispositive in this case. The definition of "foreign state" in the FSIA includes "agencies or instrumentalities" of the foreign state. 28 U.S.C. § 1603(a). An "agency or instrumentality" is defined as an entity:

> (1) "which is a separate legal person, corporate or otherwise,"
>
> (2) "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and

> (3) "which is neither a citizen of a State of the United States . . . nor created under the laws of any third country."

28 U.S.C. § 1603(b)(1)-(3).

The FSIA thus draws clear distinctions among foreign states, political subdivisions of foreign states, and agencies or instrumentalities of foreign states and political subdivisions thereof. As written, the Act provides potential immunity to entities that either (a) are organs of a foreign state or political subdivision thereof or (b) have a majority of shares owned by the foreign state or political subdivision. It does not extend immunity to entities that are owned by an agency or instrumentality of a foreign state. The *only* shares of a corporation that count toward the majority-ownership requirement of Section 1603(b)(2) are those shares held by the foreign state itself or by its political subdivisions. Shares of a corporation that are owned *not* by "a foreign state or political subdivision thereof," but instead by *another corporation* (which is the case here), do not count – even if the parent corporation happens to be an instrumentality of a foreign state or political division thereof because a majority of *its own shares* are owned by that foreign state or political subdivision.

The plain language of Section 1603(b)(2) requires this result because it fails to list as relevant shares that are held merely by *agencies or instrumentalities* of foreign states. Hence, in order to qualify under the FSIA, a corporation must have a majority of its shares owned by a foreign state or political subdivision – not by another instrumentality. The House Report reflects this understanding. It provides that "a majority of the entity's shares or other ownership interest [must] be owned by a foreign state (or by a foreign state's political subdivision)." H.R. Rep. No. 94-1487, at 15 (1976), reprinted in 1976 U.S.C.C.A.N. 6614.

Several features of the statutory structure fortify this

conclusion. First, Section 1603(a) provides that a foreign state "*includes*" an agency or instrumentality, not that an agency or instrumentality *is* a foreign state, or that an agency or instrumentality *is defined as* a foreign state. Section 1603(a)'s "includes" language does not authorize the conclusion that a corporation that happens to be an instrumentality of a foreign state actually *is* a foreign state, so as to permit infinite "tiering" under Section 1603(b)(2). *See In re Ski Train Fire in Kaprun, Aus.*, 198 F. Supp. 2d 420, 425 (S.D.N.Y. 2002) ("While section 1603(a) provides that the term foreign state 'includes' political subdivisions, agencies and instrumentalities, it does not 'equate' foreign state with agency or instrumentality. It is a subtle distinction, but also the only explanation that can be squared with the remainder of section 1603.").

Second, the meaning of the term "foreign state" in Section 1603(b)(2) is necessarily quite narrow because, by definition, it can only mean an entity that is *capable* of having "a political subdivision thereof." If the term "foreign state" in Section 1603(b)(2) were construed as meaning, from the very beginning, everything listed in Section 1603(a), then political subdivisions would already be encompassed in the term and the reference to political subdivisions in Section 1603(b)(2) would become superfluous, in violation of well-accepted principles of statutory construction. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) ("'Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)); *see also Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 n.12 (3d Cir. 1993); *In re Ski Train Fire*, 198 F. Supp. 2d. at 425.

Third, in the FSIA Congress drew careful distinctions among foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions.

Tellingly, Section 1603 is a definition section, in which each term is separately explained for correct use in subsequent parts of the statute. If Congress had intended that an agency or instrumentality could be majority owned by another agency or instrumentality, it clearly could have stated so in its definition of agency or instrumentality. If it had wished to adopt petitioners' view of the statute, Congress could have referred in Section 1603(b)(2) to the shares held by "a foreign state or political subdivision thereof, or *an agency or instrumentality thereof*." Indeed, Congress used the italicized language in 28 U.S.C. § 1606. Instead, Congress focused solely on the shares owned by "a foreign state or political subdivision thereof" – the same phrase that Congress employed in another provision of the Act to single out *only a foreign state itself and its political subdivisions*, and to exclude a foreign state's agencies or instrumentalities. *See* 28 U.S.C. § 1391(f)(4); *see also* 28 U.S.C. § 1608(a) (using similar reference to "foreign state or political subdivision of a foreign state").

The differential treatment of the three types of foreign entities defined under the FSIA is hardly unique to Section 1603(b)(2). In at least four sections of the Act besides Section 1603(b), Congress decided to single out for special treatment the "foreign state" itself, often along with its "political subdivision," in the process making clear that "agencies or instrumentalities of a foreign state" constitute a *different* sort of entity, one that is generally afforded less favorable treatment.[3] Thus, in each of the four places in which Congress used the phrase "foreign state or political subdivision thereof," it meant to exclude "agencies or instrumentalities."

The statutory text and structure thus foreclose petitioners'

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[3] Specifically: the venue provisions, 28 U.S.C. § 1391(f)(3); liability for punitive damages, § 1606; property located in the United States that is subject to attachment in aid of execution, § 1610; and service of process, § 1608.

theory of "tiered" ownership.

B. The State Did Not "Own" a Majority of Shares in the Dead Sea Companies

1. Petitioners argue that, in "ordinary speech," a majority shareholder is said to "own" the assets or subsidiaries of a corporation. Dole Br. 16. They urge that "the corporate form can be ignored" in this case (*id.* at 35) and chide the Solicitor General for advancing a "technical" interpretation of the statute. *Id.* at 33. But corporate law conceptions *are* technical. Colloquialisms and newspaper reports (Dole Br. 17 n.5) are not the proper bases for statutory interpretation in this area. The starting premise of corporate law, in fact, is that formalities matter.[4] Indeed, it is somewhat surprising that petitioners – which are themselves business corporations – should be so eager to have this Court disregard the "technicalities" of corporate ownership. If the context were different – if this were case in which a plaintiff sought to pierce the corporate veil, for example – petitioners' eagerness to disregard those formalities might well disappear.

When ownership of a subsidiary corporation is tiered through an intermediate corporation, legal ownership of the subsidiary resides in the intermediate corporation that holds the subsidiary's shares of stock.[5] Because Congress used the phrase "owned by," rather "indirectly owned by," "beneficially owned by," "controlled by," or even "attributable to," it is clear that Congress intended to require direct ownership by a foreign state.

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[4] *See* Calvert Magruder, *A Note on Partnership Liability of Stockholders in Defective Corporations*, 40 HARV. L. REV. 733, 742 (1927) ("The attribution of rights and obligations to a group as a unified juristic person is no doubt only a bit of legal technique. But technique is not to be despised. . . .").

[5] Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 299 (1996).

Congress knows how to write broadly when it wishes to. Many other statutes refer sweepingly to direct or indirect ownership or control, beneficial interests, and other forms of corporate relationships.[6] The statutory examples cited by petitioners prove

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[6] *E.g.*, 5 U.S.C. § 8477(a)(4)(G)(ii) (holders of 50% "beneficial interest" in corporation); 5 U.S.C. § 8477(a)(4)(G)(iii) ("owned directly or indirectly"); 5 U.S.C. § 8902a(c)(3) ("Any individual who directly or indirectly owns or has a control interest in" entity); 7 U.S.C. § 1a(8) ("owned or controlled, directly or indirectly"); 7 U.S.C. § 2 ("owned or controlled, directly or indirectly"); 7 U.S.C. § 1308-3a(d) ("direct and indirect ownership interest"); 7 U.S.C. § 1635i(1)(A) ("a person that directly or indirectly owns, controls, or holds with power to vote, 5 percent or more of the outstanding voting securities"); 10 U.S.C. § 2327(b)(1) ("a foreign government owns or controls (whether directly or indirectly) a significant interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary)"); 11 U.S.C. § 101(2)(b) ("corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor"); 12 U.S.C. § 84(c)(5) ("any corporation wholly owned directly or indirectly by the United States"); 12 U.S.C. § 215c(d) ("to acquire, directly or indirectly, ownership or control"); 12 U.S.C. § 221a(b)(1), (2) (corporation "of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares" or "of which control is held, directly or indirectly, through stock ownership or in any other manner"); 12 U.S.C. § 371c(b)(3) ("company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of" stock); 12 U.S.C. § 1468(b)(2) ("any person who directly or indirectly owns, controls, or has the power to vote more than 10 percent of" stock); 12 U.S.C. § 1813(w)(4) ("The term 'subsidiary' (A) means any company which is owned or controlled directly or indirectly by another company"); 12 U.S.C. § 1828 ("hold, directly or indirectly, stock or other evidences of ownership"); 12 U.S.C. § 1841(g)(1) ("For the purposes of this Act, shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company"); 12 U.S.C. § 2602(7) ("a direct or beneficial ownership interest"); 12 U.S.C. § 3500.15(c)(4)(ii) ("Directly or indirectly or acting in concert with others, or through one or more subsidiaries, owns, holds with power to vote, or holds proxies representing"); 15 U.S.C. § 78p(a)(1) ("Every person who is directly or indirectly the beneficial owner"); 15 U.S.C. § 79b(8)(A) ("voting securities . . . which are directly or indirectly owned, controlled, or held with

the same point. *See* Dole Br. 36-37 n.16.[7] The FSIA is different from these statutes. Petitioners' interpretation of Section 1603(b)(2) would disregard its distinctive text.

Section 1603(b)(2) should be construed against the basic corporate law principle that "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet v. Clark*, 287 U.S. 410, 415 (1932); *see also Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.). Congress is presumed to legislate against this "bedrock" and "venerable" principle. *United States v. Bestfoods*, 524 U.S. 51, 62 (1998). Under this rule, a foreign state does not itself own a majority of shares in a subsidiary corporation merely because the foreign state owns a majority of the shares of the parent. Rather, it is the parent company that owns the shares of stock in the subsidiary. The foreign state may own stock of the parent, but it does not "own" the parent's assets. A shareholder has only an indirect interest in the assets of the corporation, which interest is manifested in the right to share in profits through dividends and in the distribution of corporate assets on liquidation. "The corporation holds property, enters into

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power to vote"); 18 U.S.C. § 1802(3) ("The term 'newspaper owner' means any person who owns or controls directly, or indirectly through separate or subsidiary corporations"); 22 U.S.C. § 1642e(c) ("indirect ownership interest in a corporation"); 22 U.S.C. § 5605(b)(2)(F) ("any foreign air carrier owned or controlled, directly or indirectly, by that government"); 30 U.S.C. § 184(h)(1) ("owned, or controlled, directly or indirectly, by means of stock or otherwise"); 47 U.S.C. § 153(1) (Communications Act definition of "own" as including equity interest of 10% of more, and of "affiliate" as including anyone who "(directly or indirectly) owns or controls, is owned or controlled by, or is under common control with"); 47 U.S.C. § 702(7) ("corporation, or other entity which owns or controls, directly or indirectly").

[7] SEC rules regarding consolidated financial statements (Dead Sea Br. 23 n.8) are not based on the same principle as Section 1603(b)(2). Instead, "[t]here is a presumption that consolidated statements are more meaningful . . . when one entity directly or indirectly has a controlling financial interest in another entity." 17 C.F.R. § 210.3A-02(a).

contracts, executes conveyances, and conducts litigation in a legal capacity separate and distinct from its shareholders." James D. Cox and Thomas Lee Hazen, CORPORATIONS § 1.2 (2001).

Even in the immunity context, this Court has adhered to the fundamental principle that a corporation has a legal personality distinct from its shareholders. *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), for example, the State of Georgia was an incorporator and part shareholder of the Planters' Bank of Georgia. The bank challenged the court's jurisdiction on sovereign immunity grounds. Chief Justice Marshall, writing for the Court, rejected the plea, reasoning that the bank was a distinct legal entity:

> A suit against the Planters' Bank of Georgia, is no more a suit against the State of Georgia, than against any other individual corporator. . . .
>
> . . . As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. . . .
>
> . . . We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal Courts, by the circumstance that the State is a corporator.

Id. at 906-08. Five years later, the Court again rejected the Eleventh Amendment immunity objection, stating categorically: "this court is of the opinion that the question is no longer open here." *Bank of Ky. v. Wister*, 27 U.S. (2 Pet.) 318, 323 (1829). Further, "a state, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; this is equally the case, whether it own a whole or a part of the stock of the bank." *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 325-26 (1837). This principle has served as a bright-line

test distinguishing corporate bodies from the state and federal governments for purposes of Eleventh Amendment immunity,[8] state sovereign immunity,[9] and federal sovereign immunity.[10]

There is no reason to depart from this long-settled rule in construing the FSIA. To the contrary, this Court has recognized, in addressing tiered corporate structures created by foreign governments, that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). "Separate legal personality has been described as 'an almost indispensable aspect of the public corporation.'" *Id.* 625 (citation omitted). In fact, this Court explained that "[w]e find

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[8] *See Wister*, 27 U.S. (2 Pet.) at 323 (defendant bank wholly owned by state held separate entity and not immune); *Metropolitan Sav. Bank & Trust Co. v. Farmers' State Bank*, 20 F.2d 775, 780 (8th Cir. 1927) (federal jurisdiction existed over bank temporarily under state control and supervision); *Murray v. Wilson Distilling Co.*, 164 F. 1, 20-21 (4th Cir. 1908) (state liquor dispensary commission held separate legal entity and not immune).

[9] *See Georgia v. City of Chattanooga*, 264 U.S. 472, 479-80 (1924) (State of Georgia not immune from eminent domain action in state courts of Tennessee to condemn property Georgia owned and leased to private railroad corporation); *North Dakota v. Olson*, 33 F.2d 848, 851 (8th Cir. 1929) (state bank held separate legal entity not immune from federal taxation).

[10] *See Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389, 394 (1939) (regional agricultural credit corporation created under authority of federal Reconstruction Finance Corporation not immune despite absence of express "sue-and-be-sued" clause in charter); *see also Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 565-67 (1922) (U.S. Fleet Corporation not immune despite 100% federal ownership of stock); *United States v. Strang*, 254 U.S. 491, 493 (1921) (same); *Dollar v. Land*, 154 F.2d 307, 312 (D.C. Cir. 1946) (U.S. Maritime Commission); *Ingersoll-Rand Co. v. United States Fleet Corp.*, 195 A.D. 838, 843, 187 N.Y.S. 695, 698-99 (N.Y. App. Div. 1921) (Fleet Corporation not immune in state court); *Gill v. Reese*, 53 Ohio App. 134, 139, 4 N.E.2d 273, 275 (Ct. App. 1936) (federal Home Owners Loan Corporation subject to state court garnishment proceedings).

support for this conclusion in the legislative history of the Foreign Sovereign Immunities Act." *Id.* at 627. "During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* This Court quoted the FSIA House Report, which stated:

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another.

Id. at 628 (quoting H.R. Rep. No. 94-1487, at 29-30, 1976 U.S. C.C.A.N. 6628-6629 (citation omitted)).

2. Petitioner cite a number of cases in which this Court has pierced the corporate veil. Dole Br. 19-20, 35; Dead Sea Br. 21-23. For example, petitioners rely on *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R.*, 417 U.S. 703 (1974), where this Court opined that "[a]lthough a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Id.* at 713. Petitioners also rely on *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), which applied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), to uphold a Treasury regulation permitting the importation of certain "gray market" goods whose trademarks are owned by a U.S. subsidiary controlled by a foreign corporation, under a statutory scheme restricting imports of trademarked products whose trademark is "owned by" a United States company. *See id.* at 298 (Brennan, J., concurring in part and dissenting in part) ("it cannot be confidently discerned either which entity owns the trademark or whether the goods in question are 'of foreign

manufacture'").[11]

None of these cases stands for the proposition that corporate separateness is meaningless or may be disregarded on a routine basis. In fact, the cases show the opposite. *See Bestfoods*, 524 U.S. at 62 (affirming principle of corporate separateness but explaining that there are exceptional occasions when the principle will be "qualified or denied") (internal quotation marks and citation omitted); 1 Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 31, at 518 (rev. perm. ed. 1999) ("Under certain circumstances, to work justice, the corporate entity and ownership may be disregarded and the shareholder or shareholders regarded as owners; but this concedes the general rules to be just as stated.").

C. The State Did Not Hold an "Other Ownership Interest" in the Dead Sea Companies

1. Petitioners alternatively contend that the Dead Sea Companies qualify under Section 1603(b)(2) "because Israel had a 'majority . . . ownership interest' in them by virtue of being the majority shareholder in the ultimate parent." Dole Br. 21; *see also* Dead Sea Br. 25 (using same ellipsis). Petitioners'

[11] Petitioners rely on *Flink v. Paladini*, 279 U.S. 59 (1929) (Dead Sea Br. 23; Dole Br. 16, 33), while omitting Justice Holmes' caveat that a court should not "ignore the distinction between a corporation and its members." *Id.* at 63. Petitioners also invoke *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (Dead Sea Br. 23), which held but that a parent and a wholly owned subsidiary cannot engage in a "conspiracy" within the meaning of § 1 of the Sherman Act, 15 U.S.C. § 1, not because they are a single corporate entity but because they "always have a 'unity of purpose or a common design'" for purposes of antitrust law. *Id.* at 771 (citation omitted). And petitioners cite *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990) (Dead Sea Br. 22), which arose in the tax context and involved issues of corporate *control* rather than ownership. *See id.* at 339 ("We therefore construe the Tax Injunction Act as barring a federal action by a party who has under its direction and control an entity possessing a plain, speedy, and efficient remedy for the controlling party's claims.").

argument is wrong, and their use of an ellipsis is telling.

Section 1603(b)(2) does not refer in the abstract to "majority ownership interests." Rather, it refers to "shares or other ownership interest." The Ninth Circuit properly concluded that the reference to "other ownership interest" should not be interpreted "in such a way as to make the majority-shareholder requirement superfluous" but instead should be construed "simply to describe some other form of ownership not called shares of stock." Pet. App. 23a. Given the foreign legal regimes with which Congress was dealing in the context of the FSIA, it was perfectly understandable for the legislature to make provisions for kinds of equity-like ownership rights that were not explicitly denominated as shares of stock. Petitioners' amici themselves stress "the vast array of forms of ownership that the hundreds of different foreign governments with widely disparate legal systems could potentially use." Br. of Republic of Ireland 15-16. Congress was simply trying to reach stock and its functional equivalents. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (*ejusdem generis*).[12]

The State of Israel did not hold a majority shareholding position in the Dead Sea Companies. Nor did it hold a form of inchoate "property" in the Dead Sea Companies that could be described as an "ownership interest." All the State owned was stock in the Dead Sea Works (until 1975) and Israeli Chemicals Ltd. (after 1975), as well as a single share of Dead Sea Bromine. The nature of Israel's ownership interest is fully captured in the

[12] Congress elaborated on the majority requirement, explaining that where "entities are entirely owned by a foreign state, they would of course be included within the definition." H.R. Rep. No. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. 6614. However, "where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision." *Id.*

statutory term "shares," and that ownership interest never qualified as a majority shareholding interest for purposes of Section 1603(b)(2).

Petitioners would interpret the phrase "other ownership interest" to swallow up the reference to "shares" in Section 1603(b)(2). According to petitioners, the concept of an "interest" is "a comprehensive term" that includes "any right, claim, or privilege that an individual has toward real or personal property." Dole Br. 21 (internal citation omitted). "While it did not directly hold title to DSB's shares, the State of Israel clearly had an interest in the Company that allowed the State to accrue an advantage from its success and control its management and affairs." Dead Sea Br. 26. Such a broad reading of "other ownership interest" – far from supplementing the reference to "shares" – would negate that reference altogether. Moreover, petitioners never identify any conceivable "interest" besides *stock* that the state of Israel held in this case. Nor do they explain how a "majority" interest could be calculated on the basis of whatever fuzzy "right, claim, or privilege" the State of Israel might be deemed to hold in Dead Sea Bromine. Congress could have written Section 1603(b)(2) differently to capture all forms of direct and indirect ownership and control. It did not.

The Dole petitioners would apparently transform the *ownership* test of Section 1603(b)(2) into the question whether a foreign state holds "effective *control* over a majority of a corporation's board of directors." Dole Br. 23 (emphasis added). This construction is even further afield. It introduces the concept of *control* of directors into a statute that by its text focuses on *ownership* of stock. Petitioners' interpretations would change Section 1602(b)(2) into a very different statute that Congress did not enact.

Petitioners' amici would even go so far as to turn the inquiry into a multi-factored balancing test. Br. of Republic of Ireland 22. Not only is this suggestion directly contrary to the text of

Section 1603(b)(2), but it is utterly inconsistent with the very purpose of a jurisdictional test, which is ordinarily to create an administrable, predictable, bright-line rule. *See, e.g., Jerome v. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., joined by Scalia, J., concurring in the judgment) (noting that a "clear, bright-line rule . . . ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction"); *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (approving "what should be a bright-line jurisdictional inquiry") (internal quotation omitted).

That principle is particularly salient in the context of the FSIA. According to petitioners themselves, a central aim of the statute was to promote predictability by removing courts and the Department of State from case-by-case decisionmaking regarding questions of immunity. *See* Dead Sea Br. 31-33; H.R. Rep. No. 94-1487, at 8, reprinted in 1976 U.S.C.C.A.N. 6607 (discussing Tate Letter). Petitioners' balancing, control, and other non-textual tests would reintroduce the very problems the FSIA was designed to eliminate.

2. The Dead Sea petitioners argue that the State of Israel exercises "pervasive control and oversight" through the Government Companies Law, more "than would a similarly situated indirect shareholder under American law." Dead Sea Br. 28, 30. The evidence showed, however, that the State of Israel did not exert substantial control over the day-to-day operations or even the business strategies of the Dead Sea Companies. *See* pp. 2-5, *supra*. The district court found that the State of Israel's power stemmed from its ownership of the corporate parent, not from any form of special control. *See* Pet. App. 78a ("The control maintained by the government was derived mainly from the government's indirect ownership of the entities."). The Ninth Circuit found that the Companies were "*independent* commercial enterprises." *Id.* at 26a (emphasis added). Indeed, the Dole petitioners quote in their brief (Dole Br. 23) the Ninth Circuit's finding that the State of Israel's control "is not

considerably different from the control a majority shareholder would enjoy under American corporate law." Pet. App. 25a.

In any event, the meaning of the statute is a matter of U.S. law, not Israeli law. *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 122 S. Ct. 2054, 2060-61 (2002). The Dead Sea Petitioners confuse *ownership* with *control*. Section 1603(b)(2) does not create a *control* test, but a *majority ownership* test. Even the Dole petitioners acknowledge that the question of "control" is "different and 'more expansive' than ownership of a majority of shares or ownership interest." Dole Br. 36-37. *"Congress did not want the FSIA's majority ownership requirement to cover the broader category of control." Id.* at 37. The Dead Sea petitioners would rewrite Section 1603(b)(2) into the kind of statutory "control" provision which Congress has enacted in other contexts, *see* n. 6, *supra*, but not in the FSIA.[13]

The Dead Sea petitioners' argument is essentially an attempt to smuggle the FSIA's "organ" test into the entirely separate "ownership" inquiry of Section 1603(b)(2). The "organ" test asks "'whether the foreign sovereign *supervised and/or exercised control over* the entity so as to circumscribe the entity's ability to act independently'" and "'whether the entity advanced the interests of the foreign sovereign.'" Pet. App. 71a (quoting Dead Sea Companies' own brief) (emphasis added). Both the district court and the court of appeals held that the Dead Sea Companies did *not* qualify for FSIA immunity under the "organ" test, *id.* at 24a-26a, 71a-79a, and neither set of petitioners sought certiorari

[13] Even if the state of Israel had "controlled" the Dead Sea Companies, that would not satisfy the test of Section 1603(b)(2). Control by a majority shareholder is an insufficient basis to disregard the corporate form. *See* 1 W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 41.10, at 615 (rev. perm. ed. 1990) (alter ego doctrine does not apply on basis of "[m]ere domination and control of the corporation by the sole or principal shareholder").

with respect to that issue. The Dead Sea Companies' "control" argument is relevant, if at all, only to the "organ" test, which is not before this Court.

D. Petitioners' Approach Would Frustrate The Purposes of the Statute

"In 1976, Congress enacted the FSIA in order to achieve two basic objectives. First, the Act was intended to provide fairness to American plaintiffs, who previously had no established procedural remedies against foreign states. Second, the Act was intended to align the United States with international practice." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 537 (1991). Petitioners' construction of the statute would frustrate both purposes.

1. The FSIA expressly declares (28 U.S.C. § 1602) that its purpose is to adopt the "restrictive theory" of immunity. In this regard, the FSIA was intended to make United States law consistent with international practice. The House Report states that the FSIA "would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. No. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. 6605. There is "a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 94-1487, at 14, reprinted in 1976 U.S.C.C.A.N. 6613. *See also Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992); *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 487 (1983).[14]

[14] *See also* FOREIGN SOVEREIGN IMMUNITIES ACT, HEARINGS ON H.R. 11315

Petitioners' approach would frustrate this purpose by expanding immunity based solely on purported "ownership" far beyond that afforded by any other country in the world. It would move the FSIA away from its avowed purpose of aligning U.S. law with international practice by aggravating the difference between U.S. law and the laws of other countries.

The prevailing international rule provides that foreign state-owned entities with separate legal personalities generally are not entitled to sovereign immunity based on direct foreign ownership, let alone "tiered" corporate structures. "Nationalized corporations and other state owned enterprises, even those directly owned by a government, do not expect special immunity protection anywhere in the western world, including the very countries where the corporations were formed, except in United States courts."[15] "No other country in the world has adopted state ownership as a basis for conferring sovereign legal status on commercial corporations. In fact, since 1976 most jurisdictions that have enacted legislation codifying the restrictive theory have expressly rejected the idea."[16] Three codifications of

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BEFORE THE SUBCOMM. ON ADMIN. LAW AND GOVERNMENTAL RELATIONS OF THE HOUSE COMM. ON THE JUDICIARY, 94th Cong. 33 (1976) ("1976 Hearings") (testimony of Monroe Leigh, Legal Adviser, Department of State) (responding negatively when asked whether any provisions in the FSIA were significantly different than immunity treatment in other commercially developed nations).

[15] Jane H. Griggs, Note, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. NEW ENG. L. REV. 387, 432 (2001).

[16] William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 565-66 (1991); *see also id.* at 551-65, 565 n.149 (surveying Western Europe and showing that no other country grants immunity based on tiered ownership); Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 54, 57, 59, 60 (1992) (providing overall study of European sovereign immunity traditions and finding that England bases agency immunity on the existence of sovereign

international law – the United Kingdom's State Immunity Act,[17] the Council of Europe's European Convention on State Immunity,[18] and a proposal by the International Law Commission of the United Nations[19] – provide immunity based on performance of a governmental purpose, not tiered ownership. European decisions illustrate that the immunity claimed by the Dead Sea Companies in this case would be without international precedent.[20] The Dole petitioners acknowledge that "most

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authority, France bases agency on the existence of a public nature, and Germany does not extend immunity to governmental agencies at all).

[17] Section 14(2) of the United Kingdom State Immunity Act of 1978 provides: "A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if – (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State . . . would have been so immune." 17 I.L.M. at 1127. Numerous jurisdictions have enacted identical provisions. *See* Pakistan State Immunity Ordinance, 1981, § 15, reprinted in MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY at 25, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982) (hereafter "U.N. MATERIALS"); Singapore State Immunity Act, 1979, § 16, reprinted in U.N. MATERIALS at 33; South Africa Foreign Sovereign Immunity Act, 1981, § 2, reprinted in U.N. MATERIALS at 35.

[18] European Convention on State Immunity, May 16, 1972, art. 27(2), Europ. T.S. No. 74, at 4, reprinted in 3 Europ. Conv. & Agree. 39 (1972-74).

[19] Report of the Int'l Law Comm'n on the Work of its Forty-Third Session, U.N. GAOR Int'l Law Comm., 43d Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991).

[20] *See Trendtex Trading Corp. v. Central Bank of Nig.*, [1977] 1 Q.B. 529, 579 (Central Bank of Nigeria not immune); *Swiss Isr. Trade Bank v. Government of Salta*, [1972] 1 Lloyd's Rep. 497, 507 (foreign state-owned bank not immune); *Central Bank of Nigeria Cases*, Decisions of the Frankfurter Landgericht (municipal court of Frankfurt) dated Dec. 2, 1975 & Aug. 25, 1976, 1976 NJW 1044, 65 I.L.R. 131, 134 (no immunity); *National Iranian Oil Co. Legal Status Case*, No. 5 W 24/80, 21 Oct. 1980, 1980 RIW/AWD 874, 65 I.L.R. 199 (Germany) (rejecting claim of sovereign immunity by National Iranian Oil Co., even though its shares were owned by Iran); *Dhlellemes et Masurel S.A. v. Banque Centrale de la Republique de*

foreign immunity laws outside the United States do not treat government-owned corporations as 'foreign states,'" Dole Br. 35, and their attempt to harmonize their position with these foreign laws is untenable.[21]

2. A second important congressional objective was to overcome difficulties faced by American citizens in bringing claims against foreign enterprises connected to foreign states. Petitioners acknowledge that "the Act was explicitly designed to 'facilitate . . . litigation against foreign states.'" Dole Br. 47 (ellipsis and internal quotation in original). Congress was acutely aware of the unfair situation that faced a United States plaintiff who had a claim against a foreign enterprise, but had little way of knowing how, when, or if that claim would be heard in court. "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states." H.R. Rep. No. 94-1487, at 6, reprinted in 1976 U.S.C.C.A.N. 6605. "These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." *Id.* A central aim of the FSIA was to "assure that American citizens [were] not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions . . . ." 1976 Hearings at 24 (testimony of Monroe Leigh, Legal Adviser,

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Turquie, Judgment of Dec. 4, 1963 (Belgium), 45 I.L.R. 85, 86-87 (denying immunity claimed by Turkish Central Bank); *Cameroon Development Bank v. Rolber*, Judgment of Nov. 18, 1986, 79 I.L.R.532 (France) (denying immunity to bank owned by the state of Cameroon); *Corporacion del Cobre*, Judgment of Nov. 29, 1972, 12 I.L.M. 187, 189 (1973); 65 I.L.R. 57, 59-60 (France) (Chilean Copper Corporation not immune).

[21] The Dole petitioners insist that foreign laws "afford foreign-owned companies essentially the same immunity that is available under the FSIA because . . . they give immunity to entities performing sovereign acts." Dole Br. 35. The Dole petitioners confuse the "majority ownership" test of Section 1603(b)(2) with the "organ" test. It is the latter test that confers immunity based on the performance of sovereign acts.

Department of State). When signing the FSIA into law, President Gerald Ford made clear that the statute would facilitate claims against foreign companies:

> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

Public Papers of the Presidents, Gerald R. Ford, 1976-77, Book III 2610 (1979).

Petitioners' construction would frustrate this congressional purpose in several ways. First, it would dramatically expand the number of corporations which could qualify for the benefits of the FSIA. Petitioners' interpretation would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as it can be deemed to be majority-owned by a foreign state through a process of multiplying indirect shareholder stakes. Petitioners themselves assert that the tiered ownership structure for which they seek immunity is "widespread." Dole Br. 25 (internal quotation omitted). The number of entities qualifying for FSIA status will thus be significantly increased, to the detriment of U.S. citizens and of U.S. companies that must compete with these foreign entities. *See Dewhurst v. Telenor Invest AS*, 83 F. Supp.2d 577, 594 (D. Md. 2000) ("[A]llowing tiering gives these subsidiary corporations a competitive advantage over private companies. These remote corporations receive the procedural protections of the FSIA, as well as potential immunity from suit, that private corporations do not receive.").

Compounding the problem, petitioners would extend the protections of the FSIA to foreign corporations whose entitlement to such benefits would be difficult to predict in advance. Congress was aware that in many cases a United States

citizen may not even know that an entity with whom he or she is dealing has ties to a foreign state, until after a claim is brought.[22] If even foreign corporations that are directly owned by a foreign government may have a "hidden identity," the problem is certainly much worse in the case of corporations whose purported ownership by a foreign state is masked by several tiers of intermediate corporations. Rarely does the name of a corporation reflect that it is the subsidiary in a chain whose top member is owned by a foreign state. Information about the identity of shareholders of foreign corporations may not be readily accessible, even to sophisticated litigants. This hidden status is a trap for unwary persons who contract or otherwise deal with a foreign corporation on the assumption that the normal rules of jurisdiction apply.

The surprise factor was a concern of the English Court of Appeal in the landmark 1977 decision which resulted in the judicial abrogation of the absolute doctrine of foreign sovereign immunity in the United Kingdom. Lord Shaw stated:

> Those who contemplate entering into transactions with bodies which may be in a position to claim sovereign immunity are entitled at least to the opportunity of assessing any special risk which may arise. How can they know that such a risk lurks in dealing with a body which assumes a guise and bears a title appropriate to a commercial or financial institution?[23]

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[22] "[The situation may arise] when an American property owner agrees to sell and to a real estate investor that turns out to be a foreign government entity . . . ." H.R. Rep. No. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. at 6605. "In a modern world where foreign state enterprises are every day participants in commercial activities, [the FSIA] is urgently needed legislation." *Id.*

[23] *Trendtex Trading Corp. v. Central Bank of Nig.*, [1977] 1 Q.B. 529, 574.

The problem already arises in U.S. litigation.[24] Even defense counsel can be surprised to learn, well into the litigation process, that their client is a "foreign state."[25] Petitioners' proposal would worsen the problem.

Petitioners' expansion of the FSIA would also abrogate important rights and remedies which would otherwise be available to plaintiffs in ordinary civil litigation. Designation of an entity as a foreign state has critical procedural implications. The FSIA eliminates personal jurisdiction principles of state long-arm statutes and requires plaintiffs to satisfy more restrictive FSIA provisions. Under the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), the claim must arise from a commercial activity performed in the United States, or from "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or from "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States." Under the FSIA standard, the commercial activity "bearing the nexus [to the United States] must be the same activity that gives rise to the claim." Hoffman, 65 TUL. L. REV. at 576. "Thus, there will be situations where United States courts will lack jurisdiction over a matter as a result of classifying the corporation as a foreign state – e.g., where a corporation does business in the United States but the actual claim arises from business transacted elsewhere and with no effect on the United

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[24] *See, e.g., O'Connell Machinery Co. v. M.V. "Americana,"* 566 F. Supp. 1381, 1383 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984) (fact that Italian Line was a shipping company "indirectly owned" by Italian state enterprise disclosed to plaintiff several weeks after complaint was filed); *see also Velidor v. L/P/G BENGHAZI*, 653 F.2d 812, 814-16 & n.3 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

[25] *See Geveke & Co. Int'l v. Kompania Di Awa I Elektrisidat Di Korsou, N.V.*, 482 F. Supp. 660, 661 n.4 (S.D.N.Y. 1979).

States." *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 689 (S.D.N.Y. 1996).

Moreover, the FSIA prohibits jury trials, even where an exception to immunity (such as the commercial activities exception) is found to apply. *See* 28 U.S.C. § 1441(d). Thus, petitioners' broad interpretation of the statute would eliminate the right to a jury trial in a wide range of cases.[26] Section 1608(b) prescribes different rules for service of process depending on whether the defendant is a foreign state or an agency or instrumentality of a foreign state. *See* 28 U.S.C. 1608(b). Section 1610(b) also imposes a host of restrictions on a plaintiff's ability to attach or execute on the property of an agency or instrumentality. And unless an exception is shown to apply, the court lacks jurisdiction and must dismiss the case, effectively immunizing a commercial entity from suit. Significantly, the burden of production, although not of persuasion, as to the applicability of an exception to sovereign immunity shifts to the plaintiff once an entity is deemed a foreign state. *See* H.R. Rep. No. 94-1487, at 17, reprinted in 1976 U.S. C.C.A.N. 6616.

This Court should not lightly presume that Congress meant

[26] The automatic loss of the plaintiff's Seventh Amendment right to a jury trial has been the subject of commentary urging that, in this respect, the FSIA might be unconstitutional. *See* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J INT'L L. 159, 171-72, 178 (1996) (arguing that, for purposes of suits against foreign government-owned corporations, the FSIA's non-jury trial provision is unconstitutional because, at common law, jury trials were permitted against entities such as the East India Company); Kimberly K. Hill, Note, *Foreign Government-Owned Corporations, the Foreign Sovereign Immunities Act, and the Right to Jury Trial*, 1982 DUKE L.J. 1071 (same); Committee on Int'l Litigation, New York State Bar Assn., *Foreign State Defendant's Right to Trial by Jury Under the Foreign Sovereign Immunities Act*, 26 TEX. INT'L L.J. 71 (1991) (presenting an overview of the arguments for and against jury trials under the FSIA).

to impose these substantial procedural burdens on U.S. plaintiffs. *See Hyatt Corp.*, 945 F. Supp. at 690 ("Given these factors – a) the prevailing international rule and the earlier United States cases presuming that corporations were not protected by sovereign immunity; b) Congress's explicit reversal of this presumption in the case of corporations owned by foreign states or political subdivisions; c) the fact that a broad interpretation would further extend foreign state status to corporations extremely remote from sovereign control; and d) the important consequences that flow from such a classification," Congress "would have been as explicit as it was in extending immunity to corporations majority-owned by foreign states or their political subdivisions" if it had intended to confer immunity based on tiering).[27]

Petitioners' proposal would also compound the complexities of litigation. It would require parties and courts to trace potentially tortuous chains of indirect corporate stockholdings.[28] For example, the Dead Sea Companies are part of an extended, worldwide group of related commercial entities, with affiliates in such far-flung locations as the United Kingdom, the Netherlands, Japan, South Africa, and Brazil. JA 230-31. Dead Sea's own designated witness was unable to recall all of Israel

[27] The ABA Working Group cited by petitioners (Dole Br. 46, Dead Sea Br. 34) in fact recognizes these potential problems. ABA Working Group, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 523 (2002) ("We nonetheless recognize the merit in some of the points made by the courts refusing to accord the protections of the Act to tiered entities."). Although the Working Group favors presumptive immunity for tiered entities, it recommends enactment of a congressional amendment – a change in the statute as written.

[28] For disputes over foreign ownership and corporate status, see *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir.), *cert. denied*, 464 U.S. 850 (1983); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 271 (3d Cir. 1980); *Jet Line Serv., Inc. v. M/V MARSA EL HARIGA*, 462 F. Supp. 1165, 1172 (D. Md. 1978).

Chemicals' affiliates "[b]ecause there are such a large number of companies." JA 231. Although petitioners deny that tracing stock ownership would pose difficulties, tellingly the Dead Sea petitioners do not press their immunity claim with respect to BCL, "[f]or the sake of simplicity." Dead Sea Br. 7 n.4.

3. Petitioners insist that their theory is necessary to avoid "friction" in international relations. That claim is dubious. The Solicitor General, representing the United States, has not endorsed it. The State of Israel has not appeared in this litigation on behalf of the Dead Sea Companies. Only one nation – the Republic of Ireland – has appeared as amicus, and its arguments do not call the Ninth Circuit's judgment into question.[29] Stretching the FSIA in the manner sought by petitioners will itself be source of friction and embarrassment for the political branches. *See Mexico v. Hoffman*, 324 U.S. 30, 36 (1945) ("[R]ecognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.").

Moreover, petitioners' claim of "friction" is groundless because no other country in the world affords the kind of immunity sought by petitioners – least of all the State of Israel, which does not grant the Dead Sea Companies immunity in its own courts. *See* JA 261; *see also* Joseph W. Dellapenna,

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[29] Ireland does not suggest that the insurance company on whose behalf it appears would qualify for immunity in the courts of any other nation. Nor does Ireland suggest that it even considered U.S. law in deciding how to take over an insolvent insurance company in 1985. Indeed, Ireland admits that the transaction could have been structured in a way that would have qualified for FSIA immunity under the Ninth Circuit's view. *See* Ireland Br. 19 ("as a strict legal matter the Minister could have held legal title to all but six of [the insurer's] shares as the government typically does when it owns and operates commercial ventures"). In any event, Ireland contends that the insurance company qualifies for immunity under the FSIA as an "organ," *id.* at 10-11 n.9, and therefore will not be affected by the outcome of this case.

Foreign State Immunity in Europe, 5 N.Y. INT'L L. REV. 51, 51 (1992) (arguing that one of the most telling factors is how a particular entity is treated by its own government). It cannot reasonably be argued that the United States – which has already taken a more than generous step in extending immunity based upon direct ownership – has an obligation to go even further and bestow immunity based on tiered and indirect "ownership."

It is not plausible to describe the judgment below as "directing" foreign countries or "dictating" to them with regard to how corporate entities are to be structured. *Contra* Ireland Br. 11. The FSIA provides a benefit in the form of immunity, which foreign states are under no obligation to accept. The United States is fully entitled to prescribe the conditions under which it is offered.

Nor does the court of appeals' judgment lead to "arbitrary results." *Contra* Dole Br. 26; Dead Sea Br. 35. It is certainly reasonable to assume as a general rule that "a foreign state's sovereign interest in a lower tier corporation is far more likely to be significantly less than in a corporation directly owned."[30] Indeed, it is petitioners' approach that would lead to arbitrary results, by frustrating the purposes of the FSIA and extending immunity to a potentially unlimited number of tiered subsidiaries

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[30] ABA Working Group, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 524 (2002); *see also In re Ski Train Fire*, 198 F. Supp.2d at 426 ("'in light of the attenuated relationship between foreign states proper and many of their corporate subsidiaries,' Congress did not intend to grant immunity to corporations beyond the first tier of state ownership") (citation omitted); *Dewhurst*, 83 F. Supp.2d at 594 ("A corporation directly owned by a foreign government is likely controlled by that government, thereby invoking Congress's concerns about sovereign immunity. Allowing tiering, however, would extend immunity to corporations far down the chain of ownership, even if these subsidiaries are only remotely controlled by the foreign government."); *Hyatt Corp.*, 945 F. Supp. at 689 (under petitioners' view, "[m]any corporations with distant government investment, even if far removed from sovereign control, would be covered").

based on a process of multiplying indirect shareholder interests.

Further, any claim of "friction" would be untenable in light of the immunity provided under Section 1603(b)(2) to an "organ" of a foreign state or a political subdivision thereof. Although petitioners all but ignore this provision, it assures foreign states that agencies or instrumentalities performing genuinely sovereign functions will receive immunity the FSIA. The "organ" test considers "whether the entity engaged in a public activity on behalf of the foreign government." Pet. App. 24a. "In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law." *Id.* This test fully addresses the legitimate concerns of foreign states. Tellingly, in this case, the district court and Ninth Circuit both held that the Dead Sea Companies could not qualify as "organs" of a foreign state, and petitioners have not sought review of that holding in this Court.

4. Petitioners complain that the judgment below reinstates the separate entity rule, which Congress did not enact in the FSIA. Dole Br. 34; Dead Sea Br. 36-38. That argument is incorrect. The "separate entity" rule was a facet of the absolute immunity doctrine. *See* Hoffman, 65 TUL. L. REV. at 584 n.38 ("The separate entity rule developed only in jurisdictions adhering to the doctrine of absolute immunity *ratione personae* because the rule derives from the distinction, inherent only in the absolute doctrine, between the sovereign's personality and a corporate personality distinct from the state."). Because Congress meant the FSIA to embody the restrictive theory of immunity, rather than absolute immunity, Congress did not intend to adopt the separate entity rule, either. But that hardly shows that Congress meant to ignore the formalities of corporate law or the distinctions among different corporate entities. Quite the contrary: Section 1603(b)(1) requires an entity claiming immunity to demonstrate that it is "a separate legal person."

Congress thereby incorporated the concept of separate corporate personalty into the FSIA's definitional section. This Court has held that the assets of the foreign-government-owned corporation are to be treated as distinct from the foreign government itself. *See First Nat'l City Bank*, 462 U.S. at 625-26, 627. This Court reached that conclusion by applying principles of the FSIA.

5. Petitioners point to a statement in the FSIA's legislative history citing "'a mining enterprise'" as an example of an agency or instrumentality under the FSIA. Dole Br. 29 (quoting H.R. Rep. No. 94-1487 at 16). Petitioners misread the House Report, which nowhere suggested that mining enterprises (and other listed entities) will automatically satisfy the definition of agencies and instrumentalities. The House Report merely stated that these entities *could* be included, *if* they met the other statutory requirements of an agency.

To the extent the FSIA's legislative history is relevant, it provides further reason to reject petitioners' theory. If Congress intended to depart so drastically from past practice and customary international law as to also extend immunity protection to tiered subsidiaries of foreign-government-owned corporations, Congress would surely have discussed the issue somewhere in the text or legislative history. Petitioners' proposed statutory construction suffers from the mystery of the dog that did not bark.

6. Petitioners draw an analogy to U.S. government-owned corporations, arguing that "many portions of the FSIA are 'designed to place foreign governments in parity with our own federal government.'" Dole Br. 31 (citation omitted). Petitioners' analogy, however, supports the Ninth Circuit's judgment. U.S. government-owned corporations have traditionally been subject to suit in tort and contract. *See* n.10, *supra*. Federally chartered corporations are regarded as separate and distinct from the government. 6A Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1562 (1999). They do

not generally enjoy immunity from suit, even if a sue-and-be-sued clause is not included in their charter. *See Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) ("[T]he government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. . . . [T]his would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted."); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85 (1941) ("there is no presumption that the agent is clothed with sovereign immunity").

Moreover, federally chartered corporations are not ordinarily entitled to exemption from jury trials or other procedural protections. Generally, the corporations are on "an equal footing with private parties as to the usual incidents of suits." *J.G. Menihan Corp.*, 312 U.S. at 85-86. They are not automatically entitled to remove suits against them to federal court, because suits involving federal government-owned or chartered corporations do not without more create federal question jurisdiction. Under 28 U.S.C. § 1349, there is federal jurisdiction of an action by or against a corporation only if the United States owns more than half its capital stock. "There is no jurisdiction of a suit by or against a federally-chartered corporation, in which the United States does not own more than half the stock, merely because of the federal charter. Federal courts can hear this kind of case only if there is some other basis of federal jurisdiction." 13A Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3571. Further, "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *American National Red Cross v. S.G.*, 505 U.S. 247, 255 (1992).

Petitioners ignore these telling points. Instead, they focus on the designation of certain subsidiaries of the Reconstruction Finance Corporation as federal "agents or instrumentalities." Dole Br. 30-31. *Keifer* made clear, however, that this description

was *not* made for immunity purposes; the subsidiaries lacked any such immunity. 306 U.S. at 389. The relevance of petitioners' argument to the FSIA is therefore obscure. Some federally chartered corporations are designated as "agencies," while others are not.[31] But such designations occur outside the context of immunity, under statutory schemes that bear little resemblance to Section 1603(b)(2) of the FSIA. The Judicial Code, for example, defines the term "agency" to include "any corporation in which the United States has a proprietary interest." 28 U.S.C. § 451. The Freedom of Information Act includes a "Government controlled corporation" as part of its definition of "agency." 5 U.S.C. § 552(e). These markedly different definitions underscore the distinctive text of the FSIA.

7. In the end, the Dole petitioners suggest that the FSIA is not an "immunity" statute at all (despite its name), but primarily a forum-selection statute that operates to channel litigation involving foreign-government-owned corporations into federal court. Dole Br. 28. The Dole petitioners suggest, in effect, that there is no harm in stretching the FSIA to include the Dead Sea Companies because they will ultimately be held non-immune under the commercial activities exception to the FSIA. Not surprisingly, the Dead Sea petitioners take a different view.

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[31] Several important federally chartered corporations are expressly deemed *not* to be federal agencies or instrumentalities. *See* 47 U.S.C. § 731 (Comsat); *id.* at § 396(b) (Corporation for Public Broadcasting not federal agency, even though board appointed by President); 42 U.S.C. § 2996d(e)(1) (Legal Services Corporation not federal agency, even though board appointed by President). Petitioners rely on *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), where this Court held that Amtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the government by the Constitution. But this Court did not hold that Amtrak is an "agency or instrumentality" of the government for all purposes. In fact, 49 U.S.C. § 24301(a)(3) provides that Amtrak "is not a department, agency, or instrumentality of the United States Government." In *Lebron*, this Court opined that "the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit." 513 U.S. at 592.

They have insisted from the beginning of this litigation that they "are immune to suit under the doctrine of sovereign immunity." JA 57.

Even if the disagreement among petitioners were not enough to dispose of the Dole petitioners' attempt to recast the nature of the FSIA, their argument begs the question. The legislative history they cite explains that the FSIA "provides a comprehensive jurisdictional scheme in cases involving *foreign states*. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision . . . ." H.R. Rep. No. 94-1487, at 13, reprinted in 1976 U.S.C.C.A.N. 6611 (emphasis added). Petitioners' "uniformity" argument assumes that the Dead Sea Companies qualify as "foreign states" within the meaning of the House Report's discussion, but that of course is the question presented by this case. Certainly, a tiered subsidiary is far removed from the traditional sovereign instrumentality that likely was within the contemplation of the House Report.

There is no need to stretch the FSIA to provide automatic access to a federal forum for a tiered subsidiary. A foreign corporation can avail itself of alienage or diversity jurisdiction to remove a case to federal court, under the system that the Founders believed would fully address the interests of foreign defendants. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure*, 122 S. Ct. 2054, 2058 (2002). Petitioners are wrong in suggesting that there is no harm in stretching the FSIA to cover tiered subsidiaries. The procedural burdens that petitioners seek to impose on plaintiffs are directly contrary to Congress' purposes in enacting the FSIA.[32] And the

[32] For example, a key assumption of the student note upon which the Dole petitioners rely (Dole Br. 28) is that foreign government-owned corporations will lose their immunity because "people and organizations accustomed to dealing with these enterprises generally obtain a waiver of immunity, bringing the case within the exception provided by section 1605(a)(1)." Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises under the Foreign Sovereign Immunities Act*, 90 COLUM. L. REV. 2278, 2282 (1990). But persons dealing with tiered subsidiaries will frequently fail to obtain such waivers because they will have no reason to suspect that the corporations might qualify for the FSIA.

"uniformity" championed by petitioners is illusory. They propose to channel to federal court garden-variety tort and contract claims involving not foreign sovereigns but entities that the Dole petitioners at least predict will be held *non-immune*. This system will not promote "uniformity." The relevant tort and contract claims asserted against these non-immune entities will typically be governed by the laws of the several States. *See First Nat'l City Bank*, 462 U.S. at 620-21 (FSIA does not displace substantive law of liability). State laws are not "uniform." Further, state courts, rather than federal courts, are best positioned to adjudicate the claims arising from state law. In short, petitioners' rule would violate both the text and purposes of the FSIA.

II. A CORPORATION IS NOT COVERED BY THE FSIA IF THE FOREIGN STATE DOES NOT OWN A MAJORITY OF SHARES AT THE TIME THE PLAINTIFF COMMENCES SUIT.

A. The Text and Structure of the FSIA

The plain meaning of the use of the present tense language in the FSIA requires that a court evaluate a foreign corporation's status as of the time the complaint is filed and the defendant invokes the protection of the statute. The FSIA is not ambiguous. The statute repeatedly uses present tense:

> (b) An "agency or instrumentality of a foreign state" means any entity--
>
> (1) which *is* a separate legal person, corporate or otherwise, and
>
> (2) which *is* an organ of a foreign state or political

subdivision thereof, or a majority of whose shares or other ownership interest *is owned* by a foreign state or political subdivision thereof, and

(3) which *is* neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (emphasis added). The language of the section-by-section analysis in the House Report addressing Section 1603 is also written in the present tense. *See* H.R. Rep. No. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. 6614. For example, the Report explains that the Act "requires that the entity *be* . . . an organ," or that the shares or other ownership interest "*be* owned by a foreign state (or by a foreign state's political subdivision)." *Id.* (emphasis added).

This Court has held that "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992) (citations omitted) (deriving the meaning of the statute from Congress' use of "verbs in the past and present perfect tenses"). *See also Ingalls Shipbuilding, Inc. v. Office of Workers Compensation*, 519 U.S. 248, 255 (1997) ("[T]he use of the present tense (i.e., 'enters') indicates that the 'person entitled to compensation' must be so entitled at the time of settlement."); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64 n.4 (1987) ("The fact that Congress consciously chose the past tense to describe the Administrator's new authority to assess civil penalties suggests that Congress knows how to target past violations when it wants to do so."); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion) (noting "[t]he present, active tense of the operative verbs of § 703(a)(1)"); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983) ("This use of the respective tenses is significant"); *Scarborough v. United States*, 431 U.S. 563, 570 (1977) ("It is obvious that the tenses used throughout Title IV were chosen with care."); *Barrett v. United States*, 423 U.S. 212, 217 (1976) ("Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section ..., in contrast to its use of the present tense ('who is') in §§ 922(h)(1), (2), and (3)."); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (attaching significance to fact that statute "speaks in the past tense as well as the present").

In *Stafford v. Briggs*, 444 U.S. 527, 535-36 (1980), for example, this Court construed the Mandamus and Venue Act of 1962, which provided for mandamus actions to compel an officer or employee of the United States to perform a duty owed to the plaintiff. This Court noted that the statute referred to an action "in which a defendant *is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority* . . . ." 28 U.S.C. § 1391(e) (emphasis in original). This Court concluded that "[t]he highlighted language, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit." 444 U.S. at 535-36.

Congress' unambiguous use of the present tense in the FSIA must be given its plain meaning: to qualify as an agency or instrumentality of a foreign state, a defendant must be majority-owned by the foreign state at the time the complaint is filed and the defendant seeks to invoke jurisdiction under the Act. Petitioners contend that "the use of the word 'is' could speak to a variety of situations," Dead Sea Br. 42 (citation omitted) – including, apparently, events in the 1960s and 1970s, when petitioners allege the relevant events in this case occurred. Dole Br. 8-9. Only the most tortured, unnatural reading of "is" – the present tense of the verb "to be" – could lead to the interpretation petitioners suggest.

Petitioners would rewrite § 1603(b)(2) to say:

any corporation which *was, at the time of the acts upon which the complaint is based,* an organ of a foreign state

> . . . or a majority of whose shares . . . were owned, *at the time of the acts upon which the complaint is based*, by a foreign state or political subdivision thereof.

As the court of appeals opined, "[t]he statute does not say that it applies to an entity that used to be a state, although Congress could easily have said so." Pet. App. 20a.

The court of appeals' view is fortified by the comparable rule of diversity jurisdiction. The diversity jurisdiction example is particularly apt, because the House Report in fact cited the diversity jurisdiction clause of Art. III, § 2, cl. 1 (coupled with the necessary and proper clause of Art. I, § 8, cl. 3) as a constitutional basis for the FSIA. *See* H.R. Rep. No. 94-1487, at 12, reprinted in 1976 U.S.C.C.A.N. 6611. The rule under the diversity statute is clear: citizenship of the parties at the time of trial is the basis for determining whether diversity jurisdiction is available. *See Anderson v. Watt*, 138 U.S. 694, 702-03 (1891) ("the inquiry is determined by the condition of the parties at the commencement of the suit"); *accord Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 556 (1899).

Petitioners cannot point to any language in Section 1603(b)(2) to support their interpretation. Instead, they contend that Congress sometimes uses the present tense to refer to "timeless" concepts. Dole Br. 40, 42. But majority ownership status is not a "timeless" matter. Ownership shares fluctuate, and companies are nationalized or privatized. It is therefore highly unlikely that Congress would have considered ownership as a "timeless" concept or that it would have wanted to refer to "the past, present, or future 'all at the same time'" in some sort of "indefinite" way. Dead Sea Br. 42 (citations omitted).

Petitioners also point to other provisions of the FSIA which allegedly demonstrate that this Court is free to disregard the present tense of Section 1603(b)(2). But the cited provisions are inapposite. For example, the Dole petitioners (Dole Br. 41-42) refer to Section 1607(a)(7), which contains a host of past tense

verbs indicating that it clearly refers to past conduct. *See* 28 U.S.C. § 1607(a)(7) ("personal injury or death that was caused by an act of torture"); *id.* at § 1607(A) ("if the foreign state was not designated as a state sponsor of terrorism"); *id.* at § 1607(B)(ii) ("neither the claimant nor the victim was a national of the United States"). Section 1603(b)(2) is entirely different.[33]

Remarkably, petitioners give short shrift to the most relevant statutory provisions besides Section 1603(b)(2) – Section 1608, which requires special service procedures for a foreign state, and Section 1610, which imposes special rules for enforcing a judgment. These provisions plainly contemplate that the entity in question would actually qualify as a foreign state or an agency or instrumentality *at the time of suit*. After all, a plaintiff can commence a suit "against a foreign state," or "against an agency or instrumentality,"only if the defendant *is* such an entity at the time of the suit. The court of appeals opined that, based on these provisions, "[w]e have no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states." Pet. App. 20a. Petitioners similarly acknowledge that "Congress contemplated suits against sitting foreign governments and the entities they continue to own or operate at the time of suit" and that "the FSIA is primarily concerned with suits against sitting governments and their current agencies or instrumentalities." Dole Br. 48. Petitioners' attempt to claim protection for the Dead Sea Companies is unavailing.[34]

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[33] The Dole petitioners also cite Section 1605(a)(6), which refers to an arbitration that "takes place or is intended to take place in the United States." That locution plainly encompasses arbitrations that have *already* taken place; otherwise, the reference to future arbitrations that are "intended to take place" would be meaningless. No such textual basis exists in Section 1603(b)(2) for applying anything other than the present tense.

[34] Petitioners contend that the practical effect of applying the service and execution provisions to privatized entities would not be severe because one of the FSIA's service provisions for agencies and instrumentalities is no

B. The Purposes of the Statute.

It would be difficult to think of a more dramatic expression by a government that its direct interest in a company has ended than privatization. Yet petitioners insist that applying the FSIA to divested foreign corporations is necessary to serve the statute's purposes. They are wrong. *See* Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: the Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 206 (2001) ("[T]he time of filing test is superior to the alternative tests for agency or instrumentality status for three reasons: first, the time of wrongdoing test lacks a sound doctrinal foundation; second, only the time of filing test properly adheres to the principal rationale of foreign sovereign immunity, i.e., respect for foreign sovereign status; and third, only the time of filing test avoids potential constitutional problems arising from the FSIA's deprivation of the right to trial by jury in suits against changed-status foreign corporations.").[35]

Petitioners' principal argument is that, without their rule, a

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different from that used for domestic corporations and because "the execution provisions strip agencies or instrumentalities of foreign governments of almost all immunity from execution." Dole Br. 48. The practical effect is beside the point. The fact that Congress prescribed special rules for service of process and execution shows that Congress intended that the entity in question would actually *be* an agency or instrumentality at the time of suit.

[35] Any suggestion that the lower courts have uniformly resolved the question in petitioners' favor would be incorrect. Numerous courts have indicated that the inquiry should be made at the time the claim is filed. *See West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 823 (9th Cir. 1987); *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984); *Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992) (dictum); *Rutkowski v. Occidental Chem. Corp.*, 1988 WL 107342 (N.D. Ill. Oct. 5, 1988); *Morgan Guaranty Trust Co. v. Republic of Palau*, 639 F.2d 706 (S.D.N.Y. 1986), *vacated on other grounds*, 924 F.2d 1237 (2d Cir. 1991); *cf. Straub v. A.P. Green*, 38 F.3d 448, 451 (9th Cir. 1994) (applying FSIA where corporation was owned by foreign state at time of suit but not at time of harmful conduct).

court "will necessarily be called upon to pass judgment on the foreign state's actions at the time the cause of action arose." Dead Sea Br. 44. But that concern is already addressed by the act of state doctrine, under which "a court in the United States [may not] declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (federal court could not pass on the legality of the Cuban expropriation decree because doctrine forbids "passing on the validity of foreign acts of state").

The act of state doctrine avoids any "embarrass[ment]" of foreign governments, Dead Sea Br. 45 n.18, and other issues of sensitive foreign relations. Petitioners' implicit suggestion is that the statute must be judicially rewritten to cover privatized entities because of other potential foreign policy concerns – such as the possibility that a foreign government might indemnify the foreign corporation, Dole Br. 45, a risk not present here, JA 261. But there simply is no rule that federalizes any case with a foreign policy dimension. *See* Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 151 (2d ed. 1996) ("Congress has never sought to deprive state courts of all jurisdiction of all federal questions, or to authorize removal of all such questions from state to federal courts, even of cases directly involving foreign governments, diplomats, treaties, or other international matters."). Petitioners' argument is reminiscent of their federal "common law of foreign relations" theory, which the court of appeals rejected and regarding which petitioners did not seek certiorari. *See* Pet. App. 18a ("[W]e see no evidence that Congress meant for the federal courts to assert jurisdiction over cases simply because foreign governments have an interest in them . . . .").

Petitioners rely on *The Western Maid v. Thompson*, 257 U.S. 419 (1922), which involved a judicially created immunity doctrine, not a question of statutory interpretation. *The Western*

Maid reflected special in rem admiralty rules applicable to the domestic sovereign, not foreign sovereign immunity.[36] Foreign vessels were subject to different treatment. *See Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (unanimously denying immunity to a commercial ship owned but not possessed by the Mexican Government). In any event, at the time of *The Western Maid*, United States courts still adhered to the absolute theory of foreign sovereign immunity, and foreign government-owned corporations were rare. Further, the decision in *The Western Maid* was not endorsed by Congress. In fact, Congress responded to the decision in 1925 by extending the right to sue the United States to include claims involving public vessels. 46 U.S.C. App. § 781. *See Blanco v. United States*, 775 F.2d 53, 59 (2d Cir. 1985) ("The *Western Maid* merely added fuel to the fire that had already been building in Congress to [enact] . . . a waiver of sovereign immunity for damages caused by public vessels.").

The status-based immunity cases (Dole Br. 44; Dead Sea Br. 47) are likewise inapposite. They are not based on statutory interpretation. They reflect an interest in avoiding a "chill" of executive or judicial decision-making – a chill that would persist if a government official were subject to suit after leaving public office. *See Nixon v. Fitzgerald*, 457 U.S. 731, 744-45 (1982). The special interest in avoiding a "chill" of government officials' decision-making does not arise with respect to foreign corporations.

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[36] *Cf. The Siren*, 7 Wall. 152 (1869) (allowing a claim against the proceeds of the vessel when sold, but stressing that no claim could be enforced while the Government owned the vessel).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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